

STUYVESANT TOWN'S THREAT TO OUR LIBERTIES

Government Waives the Constitution for Private Enterprise

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LAST July, New York's highest court, by a four to three decision, upheld the right of the Metropolitan Life Insurance Company to bar Negroes from its Stuyvesant Town housing project. (*Dorsey v. Stuyvesant Town Corporation*, 299 NY 512.) Though the decision received nationwide mention in the press, the general impression was that it concerned only another attempt, perhaps new in its form, to ban Negroes from white neighborhoods. But when the court's majority and dissenting opinions appeared in the law journals, the issue emerged in its full gravity: the case reached down to the very roots of American freedom.

It was not merely that minorities living in slums could now, with the help of city and state governments, be ousted from their

NEW YORK STATE's highest court has upheld the right of the Metropolitan Life Insurance Company to restrict "to whites only" its huge housing development on New York's East Side, near the United Nations site, built with the public aid of the City of New York; now the Supreme Court of the United States is preparing to consider the constitutionality of this decision. The struggle to reverse the decision, CHARLES ABRAMS argues here, has significance beyond the housing area, or even the broader field of racial discrimination, important as both are. It is necessary to void a precedent, Mr. Abrams suggests, that may have the most ominous consequences for our whole American democratic pattern of government. Mr. Abrams, a leading authority in the field of housing, is an attorney, and was until recently housing analyst for the *New York Post Home News*. He himself played a prominent role, as counsel, in the legal fight to abolish racial discrimination in Stuyvesant Town. He is the author of *The Future of Housing and Revolution in Land*. His article "The Segregation Threat in Housing" appeared in the February 1949 *COMMENTARY*.

homes to make way for "restricted" private developments. Far more important was the fact that an ominous device for circumventing the constitutional safeguards against arbitrary government had received judicial sanction. Public enterprises in private hands were held free to segregate, discriminate, and be above the law. Private corporations, the Court held, may now be lawfully handed the powers and funds of government and use them unhindered by constitutional restraint.

It is not hard to see why dissenting Judge Stanley Fuld characterized the majority opinion as "perplexing." Where power is unlimited, tyranny begins. For centuries the safeguards against abuse of public power have been protected and reinforced. Its release into private hands opens a new chapter in political science. "It is impossible to balance the essence of democracy against fireproof buildings and well-kept lawns," wrote Judge Fuld, "... the constitutions, Federal and State, forbid our putting the former into the judicial scales, just as they forbade the city officials from putting it upon the bargaining table. . . this undertaking was a governmentally conceived, governmentally aided, and governmentally regulated project . . . Stuyvesant Town in its role as chosen instrument for this public purpose may not escape the obligations that accompany the privileges."

But Stuyvesant Town *has* escaped those obligations. Judge Fuld's opinion is not the law. The law is that the precious powers of government may now be used to create "private baronies." Indeed, with the recent passage of a federal urban redevelopment law, dozens of them are already in the blueprint stage all over the country.

Never before in American history has such a unique liaison between government and

private enterprise been authorized. But the surrender of public powers to non-representative private groups—always in the name of “social reform”—is not a phenomenon entirely strange to the modern world. It was one of the unique characteristics of the “corporate states” which have weighed like massive incubi on the prostrate body politic of Europe. The judicial approval of Stuyvesant Town represents an ominous relaxation of democratic controls when reinforcement is more essential than ever.

THE Stuyvesant Town “barony” consists of eighteen square city blocks and lies in the heart of New York City’s East Side facing the East River between 14th and 20th streets. It cost ninety-three million dollars to build and houses some twenty-five thousand people. It was conceived and sponsored by Park Commissioner Robert Moses as an alternative to public housing. That it is a sound investment for its owner, the Metropolitan Life Insurance Company, is due to a huge grant of tax exemption by the city totaling more than fifty-five million dollars, or more than three times the cost of the land. The city also turned over to the company public streets amounting to a fifth of the area; these streets are now closed to the public and no one but the city’s comptroller may tread on them without the company’s consent. The city also condemned the land, ousting some ten thousand low-income tenants from their homes, as well as a host of storekeepers, churches, schools—and even another publicly regulated housing project. There are no public playgrounds or schools inside the Stuyvesant Town area, for it was feared by Metropolitan’s chairman of the board that “Negro children might attend.” Negro tenants were to be barred, too, he said, because “Negroes and whites don’t mix. A hundred years from now, maybe they will.” The company openly admits its intention to discriminate against Negroes, claiming it as a “constitutional right.”

The law which authorized this singular undertaking was specially tailored to suit this nine-billion-dollar company. The osten-

sible public purpose behind these vast gifts of public moneys and powers is called “urban redevelopment,” described by the law with the novel term, “superior public use”—which means superior to schools and playgrounds, which are legally only “ordinary” public uses. The novel legal jargon, however, only inadequately conceals a more familiar process. “Urban redevelopment” is but the latest of a succession of devices conceived originally to improve housing and neighborhoods, but which have been perverted to keep minorities “in their place.”

Since minorities are most frequently “contained” in slum areas and cannot easily break out directly into better neighborhoods, they tend to infiltrate family by family where they can. A first device to prevent this infiltration was municipal zoning ordinances forbidding occupancy by certain races. These were soon held unconstitutional on the theory that an ordinance is “state action” and therefore violates the 14th Amendment which prohibits states and public agencies from enforcing laws that deny equal protection to citizens. A second device aiming to keep minorities in their places, the racial restrictive covenant, was recently held unenforceable by the courts on the ground that courts are instruments of states and therefore court enforcement would violate the 14th Amendment.*

But “urban redevelopment” is something new and different, the implications of its perversion far more sinister. The racial zoning ordinances and restrictive covenants aim only to bar minorities from coming into certain areas. Urban redevelopment, however, authorizes cities to root them out of areas in which they already live, all in the name of slum clearance. Because slum clearance is a recognized public purpose, the land on which they live and the homes they own may now be taken from them by forced sale.

Further, after acquiring the land for the private developer, the city may then turn it over to him without restrictions, according

*See Charles Abrams, “Homes for Aryans Only,” COMMENTARY May 1947, and “The Segregation Threat in Housing,” COMMENTARY February 1949.

to the Stuyvesant Town decision. Cities are authorized to sell it for less than cost, with taxpayers, Negro and white, Jew and Gentile, footing the bill. Yet while benefiting from these powers and subsidies emanating from all the people, the developer is free to discriminate in the renting of dwelling units. The theoretical justification for this is that once the property is in private hands, the discrimination is no longer "state action." The program thus grants "equality of the laws" during the process of eviction, i.e., no favorites are played and all are turned out into the streets with an even hand; but there is no equality in the sharing of the dividends of urban redevelopment. The minority is thus assured equality in the burdens, but never in the fruits. Slum clearance, which was intended to be the preliminary to decent housing, may now become the prelude to mass homelessness.

This is no academic matter, nor is it an isolated bogey inflated by alarmists. Twenty-five states have already passed urban redevelopment laws, and since Congress has now authorized huge federal subsidies for urban redevelopment, mass shifts of minorities from one slum to another worse one, may soon begin. The proportion of the overcrowding in housing occupied by non-whites is already four times as great as that of whites, the proportion of substandard housing is six times as high. These houses are the ones now most often scheduled for demolition and redevelopment. The evicted minorities find other areas barred to them while the new private redevelopment projects with few exceptions intend to follow the Stuyvesant Town exclusion policies.

The cost in human suffering may be imagined. But the evil of the program lies not only in its brutal imposition upon various minorities, but also, and perhaps primarily, in the fact that states and cities are now permitted by law to become partners to discrimination and injustice—a partnership now sanctioned by an influential court as constitutional. As racial zoning and the restrictive covenant proved, discriminatory practices are epidemic. We are thus witnessing the estab-

lishment of a legal precedent which may yet upset the safeguards of one hundred and fifty years of freedom and split the structure of constitutional government.

AWAKENING to the dangers inherent in such urban redevelopment, minority groups have attempted to write anti-bias clauses into the enabling legislation. But their efforts have, to date, been thwarted. One obstacle in the fight has been the glee with which certain legislators—Senators Bricker of Ohio and Cain of Washington deserve special mention—have used civil rights amendments as political footballs; the strategy is to tack anti-discrimination amendments on to social legislation in the hope of alienating enough Southern votes to kill the entire Fair Deal program. (Cain, it might be noted, led the filibuster which defeated the administration's civil rights program.) Unfortunately, some representatives of minority groups fell into the trap, and supported such amendments "regardless of motives." A more apt phrase would have been "regardless of political realities," for the amendment as drawn almost defeated the public housing program which offered the only hope for housing some of the evicted minorities.

At the same time, federal housing officials, who might have been expected to further the fight against discrimination in urban redevelopment, have remained indifferent. So much so, that when an amendment passed the House giving displaced tenants priority in the new urban redevelopment projects, it was smothered in conference because Housing Administrator Raymond M. Foley failed to give it administration approval.

Progress on the local front is only slightly more hopeful. Of all the state urban redevelopment laws now in effect, only Pennsylvania's bars racial discrimination. In New York City a local ordinance forbids granting tax exemption to housing projects which discriminate (but it does not apply to Stuyvesant Town which was authorized before the ordinance passed). San Francisco is the only other city outlawing discrimination in urban redevelopment; Chicago and other cities

have refused to go along, claiming that private investment would be discouraged. Experience with New York City's law, however, should dissipate Chicago's fears. More than thirty million dollars is now being invested by lending institutions in non-discriminating urban redevelopment projects, and another sixteen million dollars is being advanced for limited dividend projects.

Among the institutions making loans under the city's anti-bias ordinance are the Bowery Savings Bank, whose board chairman Henry Bruere once opposed the ordinance but has since informed the writer that he is aware of the "new social habits" and that his approach in making these loans on non-discriminating undertakings is "entirely pragmatic." The Bowery has a total of thirteen and a half million dollars invested in such projects at as little as three and one-half per cent interest. Another New York project, Queensview Houses, a cooperative, headed by Louis Pink and financed by an eighty per cent loan of six million dollars by the Mutual Life Insurance Company at four per cent, has sold almost all of its apartments to middle-income families although ten of the cooperators will be Negroes.

YET all that has been done in New York City has failed to offset the example of Stuyvesant Town and the implications of its victory in the courts. It is Stuyvesant Town the precedent, rather than Stuyvesant Town the project, that looms so large as a threat to the American way of life.

Throughout America's history, rigid restrictions have been imposed upon the government's use of the eminent domain, tax, and police powers—powers which the New York Court has held may now be used for private developers who are free from such restrictions. These three powers constitute the working tools of any government, be it capitalist, fascist, or socialist. When abused, these are the powers that threaten life, liberty, and property.

The power to regulate, for example, is also the power to regulate out of existence—the American system has therefore always

required that the courts stand guard to see that it is exercised reasonably. The power of eminent domain is the power to take another man's property—it may therefore be exercised only for a public use and upon payment of just compensation. The power to tax carries with it the obligation to use the proceeds for public purposes and not for private or class use.

One of the salient differences between democratic and totalitarian governments is that in the latter these powers are subject to the whim of a single dictator, while in a democracy their arbitrary exercise is effectively checked. The whole system of checks and balances which makes up the American republic was erected to prevent the abuse of these powers, or their subordination to private advantage.

In recent years, however, America has veered to what is euphemistically called the "welfare state," and it is here that the Stuyvesant Town decision becomes the judicial authorization for a menacing liaison between private and public enterprises.

WE ARE, to be sure, far from embarking upon any fascist ideology or upon any conscious imitation of fascism's racist aberrations. But political systems have an inherent dynamic of their own; it is not the personal motives of politicians or business men which shape the ultimate pattern in the relationship between the state and the individual.

Freedom is an ethic but it is also the by-product of economic institutions. That it has flourished in America is due not only to the scheme of separation of powers but to the separation of government from business as well. In the American system up to now, enjoyment of both property and personal freedom have been inextricably linked. The linkage survived the great shift from the freehold economy to the modern corporate system, when it continued to be to the interest of the propertied and entrepreneurial classes to oppose government expansion so as to keep taxes low and regulation minimal.

With the release of the welfare and spending powers, however, the competition for

government aid has taken a new turn. The insulation of business from government is ended and as the government has now become the main functionary in the economic milieu, the driving forces of enterprise are being headed toward the nation's capital. The trader and tycoon are rising to the occasion to manipulate government policies for their own ends, to influence legislation and to harness the public official in the private interest.

In consequence, the welfare state as it is beginning to emerge in America bids fair to be a far cry from the pure and simple dispensing of benefits to America's "common man," as was the intent of its initial sponsors. Under the guidance of certain business interests—as short-sighted as they are powerful—there is, at least in part, emerging a "business welfare state" in which the government is being called upon to pump the funds authorized under the newly expanded welfare programs into certain private pipe-lines. The "common men" are to become, as it were, the residual legatees, instead of being the direct beneficiaries: their benefits will be enjoyed at a second or third remove.

In the name of such public purposes as defense, housing betterment, encouragement of infant as well as senile industries, economic pump-priming during slumps, "protection" of savings, home-ownership encouragement, and a growing list of other high-sounding goals, we are stumbling blindly in several directions, one of which is a subsidies-to-business economy. In the name of social reforms the government is called upon also to loan to business at low rates, to socialize business losses when necessary, to remove risk from private enterprise by federal insurance. In the process, these "protected" enterprises insist, of course, upon the same immunity from regulation they enjoyed before they drew upon the government purse and the government's powers.

The majority opinion of Judge Bruce Bromley in the *Stuyvesant Town* case justifies this immunity thus: "The increasing and fruitful participation of government, both State and Federal, in the industrial and eco-

nomic life of the nation—by subsidy and control analogous to that found in this case—suggests the grave and delicate problem in defining the scope of the constitutional inhibitions which would be posed if we were to characterize the rental policy of respondents as governmental action."

DISCRIMINATION against minorities is no sudden, accidental by-product of this emerging business-welfare state. On the contrary, discrimination in older phases of the housing program, wherever the business-government liaison has been in effect, points to an intrinsic relationship and suggests the dangers of its extension into other fields.

It was, for example, in the Federal Housing Administration that the racial restrictive covenant received its greatest impetus. For years, and in fact during the entire period of the New Deal, this government agency recommended the exclusion of minorities from newly developed areas, refused to insure mortgages on property if minorities were allowed to enter, and in an official manual drew up the very racial covenants that private developers were to use if they were to be eligible for FHA insurance.

The government manual warned against such "adverse influences" as "unharmonious racial groups." It said that "if a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes." The "model" covenant it recommended provided that "no person of any race other than (race to be inserted) shall use or occupy any building or any lot, except that this covenant shall not prevent occupancy by domestic servants of a different race domiciled with an owner or tenant." In the face of vigorous protest, this manual was finally modified; but there is all too little evidence of any genuine change of heart.

Similar tendencies were noted in the liquidation operations of the Home Owners Loan Corporation. So too with urban redevelopment.

A 1944 federal memorandum on the subject ("for internal use only") states: "It is

unfortunately true that, with but few exceptions, a displacement of neighborhood population by a new group results in an immediate lowering of the neighborhood level; that is, when higher groups leave, their places are taken by lower groups, '4' people drive out '5' people, rather than the other way around." The "lower groups" or "4" people are then listed as Negroes and Jews, and examples of decline in values as a result of the "travel of Jewish groups from an original semi-ghetto" are cited.

The report goes on: "It is, of course, substantially impossible under our present social and economic system to effectively control people's movements. There is no way, nor is it necessarily socially desirable that there be a way to keep people where they are. It is, therefore, extremely difficult to prevent the encroachment upon other neighborhoods of people of unharmonious economic, social, national, and racial groups. The problem must be approached indirectly and, therefore, with poor efficiency and with only partial result."

Three "indirect" methods to "contain neighborhoods" and to keep out the "undesirables" were then proposed, including restrictive covenants which were recommended as "a rallying point around which neighborhood residents could gather to fight encroachment."

TO STAMP out discrimination in one or a few government agencies, worthwhile as this is, does not affect the disease itself but only dabs at the more irritating symptoms. For the evil of discrimination in housing is not localized; nor is it due to the personal prejudice of officials; it flows from the government-business relationship itself.

Democratic government and democratic business act under almost opposite sets of ethics and principles. Private business may, in certain respects, discriminate if it wishes to; democratic government is bound to the principle of non-discrimination and the equal protection of the laws. According to the ideal of "free enterprise," the entrepreneur may be single-minded in his quest

for profit, employ whomsoever he chooses, rent his product to whom he selects, do business with whom he wants. Minority and majority alike compete with their time, money, and talents. To be sure, abstractly speaking, the dominance of the profit motive in the economic system is supposed to be an assurance of egalitarianism, of the hiring of the most efficient employe and the catering to the source of profit, regardless of the race or ancestry of the worker or customer. But the real, working economic system under which we live deviates from the ideal model of the *laissez-faire* economists in a few important areas; economic motives do not always govern personal prejudice, and this is especially true when it touches upon the subject of housing: a man's home is his castle and an impassable moat still separates the "elite" from the unwanted in American neighborhoods. Exclusion practices function also in other fields in which employers as well as employes may be the participants.

In the private enterprise economy, however, government's role is that of keeper of the democratic morals, and it often sees that free enterprise remains truly free—a cash transaction in the open market—and is not subordinated to monopolistic restraints or racial dogmas. Any aberration in the state's activities in the direction of discrimination is subject to check by the courts, while simultaneously government is drawn toward imposing its higher standards upon private enterprise when the latter forsakes the cash-nexus for the racial-nexus. Thus, hotels and restaurants are occasionally forbidden to discriminate though they are private businesses; courts refuse to enforce contracts that are against public policy, such as restrictive covenants. Employers may be forbidden to discriminate in carrying out public contracts, even in private employment. So too, unions may be kept in line with the constitutional ethic, when they are beneficiaries of government aid or power. The free enterprise society, regulated by democratic government against abuse, has produced one of the great historical demonstrations of a tolerant society.

But in the establishment of the new government-business liaison, the ethics of the entrepreneur are not elevated to the governmental level. On the contrary, the tendency has been for government agencies to lower their own standards to those of the illiberal self-seeking entrepreneurs who find catering to prejudice easier or lucrative. This is so—and must be so—because the establishment of the joint venture imposes a responsibility upon the administrators to make the joint venture function efficiently. Thus, for example, when the subsidized builder promises his home-buying prospect a restricted neighborhood, FHA tends to acquiesce or even encourage the policy.

This should be no surprise, for FHA depends for its success upon getting a sufficient volume of housing-insurance business to make its actuarial formulas work. If this public agency made its aid to builders conditional upon non-discrimination by the latter, it might not get enough mortgage insurance to justify its existence. The same is true in joint ventures such as urban redevelopment. Not the assurance of equality in the market-place nor the inauguration of experiments in interracial harmony, but the financial success of the joint enterprise becomes the primary concern of the public administrators. Thus the government attitude becomes conditioned by the privileged private needs and interests, and soon private prejudices become part of the public policy.

A second reason for the degradation of democratic values is that the public agencies become dependent upon their private beneficiaries for lobby support in Congress. This is no secret in Washington today. The agencies best accommodated by Congress are those with an active private lobby campaigning for them. It is inevitable, therefore, that the agency officials will tend to yield to the pressures, prejudices, and customs of the beneficiary, and will close their eyes to the traditional ethical code for government behavior.

Still another reason is that few federal administrators who enact regulations are anxious to set them according to the rela-

tively higher standard of racial tolerance in the North. They are apt to be "practical" and make their rules so they can function in the South as well. What may therefore be a localized discriminatory custom tends to become the "common denominator" in racial policy, and it is usually less than the standard set by the Bill of Rights.

Thus it is that inalienable rights may be diluted, governmental standards undermined, and safeguards of freedom whittled down, until racism is not only acquiesced in but becomes part of the customs and ultimately of the law of the land.

THE strong dissenting opinion of Judge Fuld, the sharply divided court, and the crucial nature of the issue, however, all give hope that the Supreme Court of the United States will accept review of the case and perhaps reverse the holding.

This court has not been unaware of the implications of the growth of private governments, and since the days of the New Deal has rendered a series of decisions bringing them within the fold of the Constitution.

The Democratic party of Texas, declared to be a private voluntary corporation by state laws, was enjoined from refusing a Negro a Democratic ballot. It was held to be "an agency of the state in so far as it determines the participants in a primary election." (*Smith v. Allright*, 321 US 629-1944.)

When a Negro railroad employee sued to enjoin discrimination against him by a labor union which was the exclusive bargaining representative under the Railway Labor Act, the Court described the union as "clothed with power not unlike a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty to protect those rights." (*Steele v. Louisville & Nashville R.R. Co.*, 323 US 192-1944.)

A company town that refused to allow a member of Jehovah's Witnesses to use its streets for the distribution of religious literature was enjoined by the Court, which said

that "the state urges in effect that the corporation's right to control the inhabitants of Chickasaw is co-extensive with the right of a home owner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. . . . Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation." (*Marsh v. Alabama*, 326 US 501-1946.)

A Federal District Court in West Virginia found that a renting of a municipally-built swimming pool to a private company did not authorize discrimination since "the voice is Jacob's voice even though 'the hands are the hands of Esau.'" (*Lawrence v Hancock*, 76 Fed. Sup. 1004-1948.)

But while these cases have indicated an alertness on the part of the courts to the menace to civil rights inherent in the new "quasi-public" corporations,* the majority opinion in the Stuyvesant Town case has held to the view that the constitutional prohibition against racial discrimination is a prohibition against the state and that Stuyvesant Town as such is not a "state." It holds

*After the City of New York had continuously taken the position that Stuyvesant Town was "private," it issued a report on housing shortly after the Stuyvesant Town decision calling it "quasi-public housing."

that the cases cited above are not controlling.

The dissenting judges, on the other hand, insisted: "The concept of 'state action' has been vitalized and expanded; the definition of 'private' conduct in this context has been tightened and restricted. . . . The construction and operation of Stuyvesant Town are not matters of 'merely private concern'. . . . Everywhere in evidence are the voice and authority of the State and City. . . . Stuyvesant is in no sense an ordinary private landlord. . . . The argument overlooks that the constitutional rights of American citizens are involved and that such rights may not be used as pawns in driving bargains. . . . The mandate that there be equal protection of the laws, designed as a basic safeguard for all, binds us and respondents as well to put an end to this discrimination."

In Stuyvesant Town, the issue of private government versus the Constitution is clearly drawn. The crucial question is whether a 1789 Constitution, devised for a private enterprise system and a democratic government, can safely serve as a basis for a business-welfare state. Unless the challenge is clearly seen in its full portent, and unless shaken principles and safeguards are retrieved and re-affirmed, the stage may be set in the years to come for a dangerous innovation on the American political scene.